No. 95-1211

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOHN J. NICIT,

Petitioner,

vs.

ANN MARIE NICIT,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, Fourth Department

RESPONDENT'S BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

1. Whether the Alabama divorce decree duly entered in the Circuit Court of Winston County, Alabama is valid?

2. Whether the Alabama divorce decree is entitled to full faith and credit?

3. Whether petitioner has presented any issues appropriate for Supreme Court review?

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PRELIMINARY STATEMENT

Respondent Anna Marie Nicit (hereinafter "respondent" or "Mrs. Nicit") respectfully submits this brief in opposition to Petitioner John J. Nicit's (hereinafter "petitioner" or "Mr. Nicit") petition seeking a writ of certiorari.

STATEMENT OF FACTS

The parties were married in 1956 and had three children, two of whom are deceased. The third is emancipated. (A. 10).[1] At the time of their marriage, Mr. Nicit was a practicing attorney in Seneca County. Mr. Nicit practiced law throughout the parties' marriage at his own firm, Nicit & Bonney. (R. 152-154). Mr. Nicit continued to practice full-time at the time of trial and throughout these proceedings, he has either represented himself or been represented by his partner. (R. 524-530).

Mrs. Nicit performed the traditional duties of a wife and mother and attempted to help Mr. Nicit's political career. After intermittent marital difficulties including more than one separation, the parties separated in 1986. (R. 253).[2] Mrs. Nicit moved out of the marital home and ultimately purchased two parcels of property in Waterloo, New York. She also purchased a recreational vehicle in which she lived. (R. 257-261).

Mrs. Nicit sued Mr. Nicit for divorce in 1987, which action Mr. Nicit actively opposed. That action was dismissed in 1988.

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1. "A." refers to the Appendix submitted by respondent on appeal below and duly filed and indexed with the New York State Appellate Division, Fourth Department.

2. "R" refers to the Record submitted by respondent on appeal below and duly filed and indexed with the New York State Appellate Division, Fourth Department.

Mrs. Nicit later sued Mr. Nicit for divorce in 1990 and that action was dismissed in 1991. (A. 11).

Mrs. Nicit sued Mr. Nicit for support in 1989 and a family court order of support from the Family Court, Tompkins County, New York, was entered in 1989 for $25,000 per year. (R. 357-365). Mrs. Nicit was required to return to court in order to enforce the order. Mr. Nicit moved to modify the order in 1990 but was unsuccessful. (R. 357-365). There was also evidence at trial that Mr. Nicit, in preparing the 1991 order dismissing Mrs. Nicit's complaint, improperly added relief which had not been granted by the court, forcing Mrs. Nicit to bring a motion to settle the order. (R. 524-531).

Mrs. Nicit is seventy years old, and suffers from health problems and is unable to work. Specifically, she was diagnosed with cancer in 1992 and has undergone numerous chemotherapy treatments and surgery. She also suffers from arthritis and is being treated with medication. (R. 161-164).

The record shows that the respondent relocated to Alabama in early October of 1992 (R-58). The record is clear that she purchased property in Alabama on or about October 19, 1992 on which she established her home. (R-51, 60). The record is also clear that the respondent paid Alabama state income taxes for the portion of the year after which she became a resident (R-52-54) and that she filed her federal tax return using the Alabama address as well for 1992. The respondent testified extensively at the deposition concerning her intent to make Alabama her home. Prior to moving, Mrs. Nicit put up for sale the two parcels of land on which she had been living in New York and purchased land in Alabama in October 1992. (R. 197-198).

In 1993 she brought an action in Alabama for divorce which was commenced by personal service upon Mr. Nicit, Mr. Nicit

defaulted and the divorce was granted. (A. 8). Mrs. Nicit then brought this action for equitable distribution which is the subject of Mr. Nicit's petition to this Court.

STATEMENT OF THE CASE

Mrs. Nicit commenced an action for divorce in 1993 in the Circuit Court of Winston County, Alabama, where she resides. (A. 10). Mr. Nicit was served both by mail and personally with the summons and complaint in that proceeding. Mr. Nicit chose not to appear and the matter proceeded by default. Mrs. Nicit was granted a decree of divorce which terminated the marital relationship between the parties but did not affect their property rights and specifically stated that it did not affect the prior Family Court order for support granted by the Family Court in Tompkins County, New York, in favor of Mrs. Nicit. (A. 12).

On February 15, 1994, by way of Order to Show Cause, Mrs. Nicit brought a proceeding for equitable distribution of the parties' marital property in New York Supreme Court, Seneca County. Mr. Nicit duly answered and the trial court had personal jurisdiction over the parties. On June 27, 1994, Mr. Nicit moved for summary judgment which was heard by the Court on July 11, 1994. Mr. Nicit's motion was denied. (A. 10). Mr. Nicit tried to obtain a stay pending his appeal, but was refused. Mr. Nicit appealed the trial court's denial of his motion for summary judgment, which was affirmed by the Appellate Division of the Supreme Court, Fourth Department, on December 23, 1994. (A. 45).

This case was tried in Seneca County Supreme Court before Judge James R. Harvey on July 11, 12 and 13, August 9 and 11, on the equitable distribution issues and November 18, 1994 on the issue of counsel fees. Final judgment was entered by the court on December 5, 1994, from which judgment Mr. Nicit also

appealed. Mr. Nicit's appeal of the trial court's decision to the Appellate Division, Fourth Department, was similarly unsuccessful, and costs were awarded to Mrs. Nicit. (Resp. App.[3] 2a-3a).

Mr. Nicit then appealed both the denial of his motion for summary judgment and the trial court's decision on the merits to the New York State Court of Appeals. Mr. Nicit's motion seeking leave to appeal and appeal as of right was denied by the Court of Appeals with regard to both decisions. (Resp. App. 1a, 4a-5a). Mr. Nicit then moved for reargument to the Court of Appeals, which was denied with costs. (Resp. App. 6a-7a). This petition seeking a writ of certiorari ensued.

REASONS FOR DENYING THE WRIT

I.

THE ALABAMA DIVORCE DECREE IS VALID.

The decree upon which Mrs. Nicit's subsequent equitable distribution action was based is found in the Appendix at page 8. The decree was duly filed in Alabama, and as such, is presumptively valid. *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942).

At no time has Mr. Nicit attempted to attack the Alabama decree, either prior to its entry or subsequent to the service and filing of the decree. Mr. Nicit complains that there is not sufficient evidence of domicile in the papers filed by Mrs. Nicit in Alabama; however, it is clear based upon Mr. Nicit's own admission that he was not present for any of the proceedings had in Mrs. Nicit's Alabama action. Clearly, any testimony or

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3. "Resp. App." refers to respondent's appendix which is attached hereto.

pleadings presented by Mrs. Nicit or her counsel were sufficient to satisfy the Alabama judge that jurisdiction existed over Mrs. Nicit and hence, the parties' marriage. In any event, Mr. Nicit was given the opportunity to appear and oppose the entry of the divorce, which he failed to do.

In addition, it is clear based even upon the proceedings had in New York State that Mrs. Nicit is domiciled in Alabama, and was at the time the divorce action was commenced. As is more fully set forth in the "Statement of Facts" section of this brief, substantial testimony was given by Mrs. Nicit at her deposition and again at trial with regard to Mr. Nicit's claim that Alabama did not have jurisdiction over Mrs. Nicit at the time the decree was entered. In light of said testimony, the trial court found, and the Appellate Division of the New York State Supreme Court affirmed, that Mrs. Nicit was and is a resident of Alabama, and that the decree is, as a result, valid.

II.

THE LOWER COURTS PROPERLY ACCORDED FULL FAITH AND CREDIT TO THE ALABAMA DIVORCE DECREE, AND MR. NICIT'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Mr. Nicit claims that his rights under the United States Constitution were violated because the Alabama divorce decree was used as a basis to entitle Mrs. Nicit to equitable distribution of marital property located in New York State. The parties were divorced by a decree of divorce issued by the Circuit Court of Winston County, Alabama on November 9, 1993. An exemplified copy of that decree of divorce was admitted into evidence as Exhibit 24. (A. 8).

A foreign decree of divorce validly procured by a party who is a bona fide domiciliary of the rendering State is entitled full faith and credit in every other State, even though the other party was not domiciled in the rendering State and did not appear in the action. United States Constitution, Article IV, Section 1; *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942); *Douropoulos v. Douropoulos*, 67 Misc. 2d 518, 323 N.Y.S. 2d 92 (S. Ct. Queens Co. 1971).

The party attacking the validity of the sister State judgment has the burden of establishing its invalidity since there is a presumption of the validity of the foreign judgment. *Williams v. North Carolina, id.; Douropoulos v. Douropoulos, id.*

It is clear that the creation and changing of one's domicile is a question of fact. *Rosenstiel v. Rosenstiel*, 368 F. Supp. 51 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 1397 (2d Cir. 1974). The documents admitted into evidence and the testimony in this case are overwhelming in proving that Mrs. Nicit severed her ties with New York State and moved her residence to Alabama in early October of 1992. Prior to leaving New York, Mrs. Nicit placed the two parcels of land on which she previously lived up for sale with a local realtor. She relocated her bank accounts to Alabama, purchased land there on October 19, 1992, took steps both before and after October 19 to improve that land, voted in the presidential election from Alabama in 1992, paid Alabama state income tax for the period of time she was a resident in 1992, obtained an Alabama driver's license and made her residence there.

Under New York and federal case law, a foreign divorce decree is entitled to full faith and credit to the extent that it dissolves a marriage, but may not be enforceable to the extent that it affects a party's property rights where that party is a resident of New York State. *Mattwell v. Mattwell*, 194 A.D.2d 715, 600 N.Y.S. 2d 98 (2d Dept. 1993).

Clearly, the Alabama divorce decree did not address property division, which is why Mrs. Nicit was required to bring a petition for equitable distribution in New York State. However, Mr. Nicit makes the circular argument that because Mrs. Nicit's equitable distribution petition in New York was brought as a result of her obtaining a valid divorce in Alabama, Mr. Nicit's rights have been violated by the Alabama divorce decree, even though it did not address property division. This position is contrary to the law of New York State and, moreover, to United States Supreme Court case law. *Williams v. United States,* 317 U.S. 287 (1942).

Under New York law, once a party has obtained a divorce in a foreign jurisdiction, that party may seek equitable distribution of property pursuant to that decree as against a New York resident. Domestic Relations Law § 236B; *Mattwell v. Mattwell,* 194 A.D.2d 715, 600 N.Y.S. 2d 98 (2d Dept. 1993); *Peterson v. Goldberg,* 180 A.D.2d 260, 585 N.Y.S.2d 439 (2d Dept. 1992); *Mahoney v. Mahoney,* 131 A.D.2d 822, 517 N.Y.S. 2d 184 (2d Dept. 1987); *Braunstein v. Braunstein,* 114 A.D.2d 46, 497 N.Y.S. 2d 58 (2d Dept. 1985); *Lansford v. Lansford,* 96 A.D.2d 832, 465 N.Y.S. 2d 583 (2d Dept. 1983). Moreover, this Court addressed the constitutionality of enforcing a decree of divorce arising from a foreign divorce decree, and has found same to be appropriate. *Williams v. North Carolina,* 317 U.S. 287 (1942).

The *Mattwell* case is on point and makes clear that Mr. Nicit's argument is without merit. In that case, the husband sought equitable distribution of marital property located in New York State after obtaining an ex parte foreign divorce. The wife challenged the court's authority to distribute property pursuant to the ex parte divorce decree. The court held:

> In the present case, the former husband claimed an interest in New York marital

> property. In accordance with the plain language of the governing statutes (see, Domestic Relations Law § 236[B][2], [5], [9]), and in accordance with our precedent, he may therefore commence an action for equitable distribution of property following the entry of the ex parte foreign judgment of divorce.

Id. at 718, 600 N.Y.S. 2d at 100 (citations omitted).

The *Peterson* case also presents facts identical to the instant action. There, the plaintiff moved out of state and obtained an ex parte divorce. The defendant remained in New York. The court held that, although the foreign divorce decree could not address equitable distribution issues, the decree was entitled to full faith and credit with regard to the dissolution of the parties' marriage.

> Clearly, the Florida judgment terminated the parties' status as husband and wife and that judgment must be accorded full faith and credit in the courts of New York. (*See, Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942); *Elson v. Elson*, 149 A.D.2d 141, 545 N.Y.S. 2d 311) (2d Dept. 1989). It is equally well settled, however, that a valid ex parte foreign divorce terminates only the marital status of the parties. Such a divorce is 'divisible' in that it has no effect upon the property held by the parties outside of the jurisdiction of the state issuing the judgment. (*See, Vanderbilt v. Vanderbilt*, 1 N.Y. 2d 342, 153 N.Y.S. 2d 1, 135 N.E. 2d 553, *aff'd*, 354 U.S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456; *Lansford v.*

> *Lansford*, 96 A.D.2d 832, 834, 465 N.Y.S. 2d 583; *Burford v. Burford*, 24 A.D.2d 491, 261 N.Y.S. 2d 489; *Anello v. Anello*, 22 A.D.2d 694, 253 N.Y.S. 2d 759; see generally, Note, Divisible Divorce 76 Harv. L. Rev. 1233; *cf.*, *Kindler v. Kindler*, 60 A.D.2d 753, 754, 400 N.Y.S. 2d 605). Accordingly, to provide for the distribution of property not affected by a foreign judgment of divorce, Domestic Relations Law § 236(B)(2) and (5) provide that a divorced spouse who possesses an interest in marital property within this State may commence an action for equitable distribution of property following entry of a foreign judgment of divorce (*see, Nikrooz v. Nikrooz*, 167 A.D.2d 334, 561 N.Y.S. 2d 301; *Mahoney v. Mahoney*, 131 A.D.2d 822, 517 N.Y.S. 2d 184; *Braunstein v. Braunstein*, 114 A.D.2d 46, 497 N.Y.S. 2d 58; *Bennett v. Bennett*, 103 A.D.2d 816, 478 N.Y.S. 2d 47; *cf., Elson v. Elson, supra; Mattwell v. Mattwell*, 149 Misc. 2d 505, 565 N.Y.S. 2d 961). The instant action was thus properly converted to one for equitable distribution following the entry of the Florida judgment of divorce.

Id. at 262-263, 585 N.Y.S. 2d at 440-41.

The instant action presents facts identical to the above-cited cases. Mrs. Nicit obtained a valid default divorce in Alabama. The Alabama court made no determination with regard to support or property distribution. Mr. Nicit's argument that Mrs. Nicit cannot, pursuant to an out-of-state divorce decree, seek equitable distribution in New York State is contrary to

established case law in New York State, as well as Domestic Relations Law § 236B, which expressly permits this procedure. Mrs. Nicit is entitled to seek equitable distribution in New York State based on the Alabama divorce decree, which is entitled to full faith and credit in New York State.

III.

THERE IS NO BASIS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI TO PETITIONER.

This Court has already addressed the precise issue presented by Mr. Nicit: whether it is constitutional to afford full faith and credit to a foreign divorce decree as against the non-domiciled party. *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942). This Court has already determined that such a decree is entitled to full faith and credit.

Mr. Nicit's petition does not meet, nor does it even purport to meet, any of the requirements of Supreme Court Rule 1 outlining the circumstances pursuant to which this Court might consider granting certiorari. Because Mr. Nicit has failed to cite any basis for the granting of certiorari, his petition must be denied.

CONCLUSION

WHEREFORE, based upon the foregoing, Respondent Anna Marie Nicit respectfully requests that this Court deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — ORDER ENTERED FEBRUARY 3, 1995

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

MOTION NO. 1793/94

PRESENT: DENMAN, P.J., GREEN, CALLAHAN, BALIO, BOEHN, JJ.

ANNA MARIE NICIT,

RESPONDENT,

V

JOHN J. NICIT,

APPELLANT.

Appellant hading moved for leave to appeal to the Court of Appeals from the order of this Court entered December 23, 1994,

Now, upon reading and filing the affirmation of Sam C. Bonney dated January 9, 1995, the notice of motion with proof of service thereof, the opposing affidavit of David C. Boysen sworn to January 12, 1995, and due deliberation having been had thereon,

It is hereby ORDERED, That the motion be, and the same hereby is, denied.

Entered: February 3, 1995 CARL M. DARNALL, Clerk

APPENDIX B — ORDER ENTERED JULY 14, 1995

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

0987

PRESENT: GREEN, J.P., LAWTON, WESLEY, DOERR, DAVIS, JJ.

MATTER OF ANNA MARIE NICIT,

RESPONDENT,

V

JOHN J. NICIT, APPELLANT.

The above named John J. Nicit having appealed to this Court from the judgment of the Supreme Court, entered in the Seneca County Clerk's office on December 12, 1994, and said appeal having been submitted by Sam Bonney of counsel for appellant, David Boysen of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously affirmed with costs.

Memorandum that is hereby made a part hereof.

Entered: July 14, 1995

APPENDIX C — DECISION FILED SEPTEMBER 29, 1995

MOTION NO. 987/95

MATTER OF ANNA MARIE NICIT,

RESPT.,

V.

JOHN J. NICIT,

APPLT.

PRESENT: GREEN, J.P., LAWTON, WESLEY, DOERR AND DAVIS, JJ.

Motion for reconsideration and other relief denied.

APPENDIX D — ORDER DATED NOVEMBER 2, 1995

STATE OF NEW YORK
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the second day of November 1995

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

4-10 Mo. No. 1138

In the Matter of Anna Marie Nicit,

Respondent,

v.

John J. Nicit,

Appellant.

The appellant having filed notice of appeal and a motion for leave to appeal to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

Appendix D

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX E — ORDER DATED JANUARY 9, 1996

STATE OF NEW YORK
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of November 1996

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding*

Mo. No. 1611

In the Matter of Anna Marie Nicit,

Respondent,

v.

John J. Nicit,

Appellant.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX F — DECISION DATED JANUARY 9, 1996

STATE OF NEW YORK
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION January 9, 1996

Mo. No. 1611

In the Matter of Anna Marie Nicit,

Respondent,

v.

John J. Nicit,

Appellant.

Motion for reargument of motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.